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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC. *et al.*,
Petitioners,

v.

THORNTON, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF OF GOVERNOR JOHN ENGLER
AS AMICUS CURIAE IN SUPPORT OF
PETITIONERS

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(i)

QUESTION PRESENTED

Does Arkansas Amendment 73 regulating the placement of the names of long-term incumbents on the ballot violate Article I of the United States Constitution?

(ii)

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BRIEF OF GOVERNOR JOHN ENGLER
AS AMICUS CURIAE IN SUPPORT OF
PETITIONERS

Governor John Engler submits this brief as amicus curiae in support of the petitioners.

INTEREST OF THE AMICUS

Governor John Engler is the chief executive officer of the State of Michigan. The people of the State of Michigan enacted a term limit law in 1992. This law provides that long-term incumbents may no longer serve after a certain number of years. As a consequence, if Arkansas Amendment 73 is found to be unconstitutional, the Michigan law will be affected.

Besides being the governor of a state that overwhelmingly approved term limits, John Engler is a citizen of the United States and of the State of Michigan. As such, he

wants to ensure that the playing field between long-term incumbents and political newcomers is leveled. The citizens of Michigan have decided how such a leveling could be achieved, as have the citizens of numerous other states. Governor Engler thus joins with petitioners in asking this Court to uphold the overwhelming decision of citizens who have been given the choice to vote on limiting the power of long-term incumbents.

STATEMENT OF THE CASE

The citizens of the State of Arkansas adopted Amendment 73 to the Arkansas Constitution by a vote of 494,326 to 330,836 on November 3, 1992. This citizen-initiated amendment provides in pertinent part that, "any person having been elected to three (3) or more terms as a member of the United States House of Representatives from Arkansas shall not be eligible to appear on the ballot for election to the United States House of Representatives from Arkansas." A similar ballot access measure of two (2) terms exists for United States Senators.

A lawsuit for declaratory relief was filed on November 13, 1992, in Pulaski County Circuit Court. The circuit court found that Amendment 73 was not a time, place and manner regulation under Article I, Section 4 of the United States Constitution. Consequently, the circuit court found that Amendment 73 violated Article I, Sections 2 and 3 of the United States Constitution, which set forth age, citizenship, and inhabitancy requirements for members of Congress. The Arkansas Supreme Court upheld this decision. A petition for certiorari was granted by this Court on June 20, 1994.

SUMMARY OF ARGUMENT

This brief will show that Amendment 73 to the Arkansas Constitution is constitutional by first considering Article I, Section 4 of the United States Constitution, which allows states to regulate the "Times, Places and Manner of holding Elections." This brief will also show

that Amendment 73 is consistent with the minimum requirements of age, citizenship, and inhabitancy placed on federal senators and representatives by the Constitution. This brief will focus almost exclusively on the historical record at the time of the adoption of the Constitution.¹

The unvarying historical record and practice show that the states and Congress have broad power to regulate elections under Article I, Section 4 of the United States Constitution. The breadth of the power retained by the states and granted to Congress by Section 4 has been thought to allow states to prevent the holding of elections and to allow Congress to disqualify persons from office who have engaged in various acts. Numerous other examples show not only that the states and Congress have the power to broadly regulate elections but also that Article I, Sections 2 and 3, which set forth the age, citizenship, and inhabitancy requirements for members of Congress have been considered minimal qualifications. This understanding of the powers retained by the states and given to Congress under Article I, Section 4 is consistent with the explicit text of the Constitution, the views of the members of the Constitutional Convention, the views of the members of the state ratifying conventions, the reasoning expressed by the Federalists and Anti-Federalists during the ratification process, and the unvarying practice of the states and Congress. In short, no justification in the text of the Constitution or in historic practice exists to support the view that Amendment 73 of the Arkansas Constitution violates Article I of the United States Constitution.

¹ A more extensive review of most of this material can be found in the book and article counsel has written on this matter. See Stephen Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 Creighton L. Rev. 321 (1993); Stephen Safranek, *The Constitutional Case for Term Limits* (U.S. Term Limits Foundation, 1993).

ARGUMENT

I. ARTICLE I, SECTION 4 OF THE UNITED STATES CONSTITUTION ALLOWS STATES BROAD REGULATORY POWER OVER ELECTIONS

Article I, Section 4 of the United States Constitution provides that:

[T]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.²

Congress has broadly exercised the power allocated to it under this part of the Constitution.³ States have also extensively regulated elections. The State of Arkansas, whose law is under review by this Court, has extensive ballot regulations,⁴ including provisions preventing some

² U.S. Const., art. I, § 4.

³ Congress has enacted an abundance of regulations pursuant to this power. See generally Act of June 25, 1842, ch. 47, 5 Stat. 491; Act of June 15, 1844, ch. 68, 5 Stat. 670. Through such statutes Congress has regulated the time for holding elections for Congress. See Act of Aug. 30, 1856, ch. 30, 11 Stat. 150; Act of July 25, 1866, ch. 245, 14 Stat. 243. It has even regulated the specific format for the request for absentee ballots and the ballot itself. Act of Sept. 16, 1942, ch. 561, 56 Stat. 753, 754-55; Act of Apr. 1, 1944, ch. 150, 58 Stat. 136. Today there are no less than one hundred and ninety statutes or code provisions in the United States Code governing elections, ballots or political activity. See generally 2 U.S.C. §1 et seq. (1994); 2 U.S.C. §431 et seq. (1994); 18 U.S.C. §591 et seq. (1994); 42 U.S.C. §1973 et seq. (1994). One example of such regulation is the recent "motor voter" statute requiring states to provide for simultaneous application for voter registration and application for motor vehicle licenses. 42 U.S.C. §1973gg-3 (1994).

⁴ See generally Ark. Code Ann. § 7-1-102 et seq. (West 1993).

groups from having names of their candidates placed on the ballot.⁵ California has devoted over 35,000 sections to regulating its elections.⁶ The exercise of these powers by the states and Congress is consistent with the language of Article I, Section 4 and its historical understanding found in the reports from the Constitutional Convention, the state ratifying conventions and the Federalist and Anti-Federalist debates.

A. The Constitutional Convention

Article I, Section 4 was first presented in the Constitutional Convention by the Committee of Detail on August 6, 1787. The section first read:

The Times and Places and Manner of holding Elections for the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.⁷

Although this section was entirely new, it met with little discussion in the Convention. Only the "manner" clause that gave the federal legislature ultimate control over elections was the subject of debate. James Madison argued that the federal legislature must have ultimate power because states might use their power under this clause to mold their regulations to favor the candidates they wished to succeed.⁸ Gouverneur Morris supported Madison by noting that without this provision for federal

⁵ *Id.* at § 7-3-108.

⁶ See generally Cal. Elections Code § 1 et. seq. (West 1994).

⁷ James Madison, *Notes of Debates in the Federal Convention*, 387 (2d ed. 1985).

⁸ *Id.* at 424.

control, states might make false returns and prevent new elections.⁹

The wording of this article was slightly revised by the Committee of Detail on September 12, 1787, and a provision for not allowing the federal legislature to move the place of the choosing of senators was added without debate.¹⁰ The state conventions did not show the same restraint in debating Article I, Section 4.

B. The State Ratifying Conventions

Many of the representatives at the state ratifying conventions were disturbed by the broad language of Article I, Section 4 because it gave Congress the power to alter state decisions regarding elections.¹¹ Members of practically all of the state conventions were disturbed by the word "manner" in Article I, Section 4 because they thought that it had virtually unlimited meaning. Second, the members of these conventions thought that the broad meaning of this word, placed as it is in the time clause, gave Congress unfettered discretion to alter elections. No other entity, legislative, executive or judicial, state or federal, could control this discretion.

The term "manner" in Article I, Section 4 of the proposed Constitution caused a sharp controversy in virtually all of the recorded debates of the state conventions. For instance, Representative Cooley, in Massachusetts, said that under this clause Congress had "authority to control

⁹ *Id.*

¹⁰ *Id.* at 635.

¹¹ See 4 *Elliot's Debates on the Federal Constitution* 50 (2d ed. 1901) (Hereinafter *Elliot's Debates*). Governor Johnston of North Carolina was led to exclaim concerning this clause, "I observe that every state which has adopted the Constitution, and recommended amendments, has given directions to remove this objection [regarding the broad power given to Congress]; and I hope, if this state adopts it she will do the same." *Id.* His comment was not untypical.

elections, and thereby endanger liberty."¹² He was followed by Representative Taylor who said that the manner clause allowed Congress to place money qualifications upon electors.¹³ Thus, the initial discussion of this term at the Massachusetts convention reveals a twofold concern: the extent of the power given and the vesting of that power in Congress.

The response of those who sought ratification of the Constitution reveals that Representative Taylor understood the meaning of manner but that he miscalculated the potential for abuse of the power given by Article I, Section 4. Rufus King, a member of the Massachusetts delegation to the Constitutional Convention, defended the ambiguity in Article I, Section 4. He noted that the Constitution largely left the regulation of elections to the states because states had differing ways of electing representatives.¹⁴ However, King noted that in some states the manner of elections prevented representation proportional to the number of persons eligible to vote in various districts.¹⁵ In South Carolina, for instance, Charleston sent 30 out of 200 representatives to the state legislature even though it did not have 15% of the population of the state. Because of the city's hold on power, it did not allow a change in representation. Such a problem, King noted, can and should be rectified by Congress so that the representatives would truly "be chosen by the people."¹⁶ King's response, which argues for the amplitude of Article I, Section 4, effectively ended the discussion.

The Massachusetts convention spent about 15% of its

¹² 2 *Elliot's Debates* 49.

¹³ *Id.* at 49-50.

¹⁴ *Id.* at 50.

¹⁵ *Id.*

¹⁶ *Id.* at 51.

recorded time discussing the term "manner." The degree of concern about this clause also can be seen in the recommendations by Massachusetts for amendments to the Constitution. Among their nine recommendations was:

Thirdly, that Congress do not exercise the powers vested in them by the 4th Section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeable to the Constitution.¹⁷

New York, the most critical northern state, considered the Constitution nearly six months after Massachusetts and after five additional states had been added to the ratification list, which then numbered ten. The concerns articulated in that debate are similar to those seen in the Massachusetts convention. The debate was initiated by Representative M. Jones who proposed an amendment to the Constitution similar to that proposed in Massachusetts.¹⁸

Representative Jay apparently tempered the desire for such an amendment when he noted, "The obvious meaning of the [manner] paragraph was, that, [if the states neglected to elect representatives] . . . Congress should have power, by laws, to support the government, and pre-

¹⁷ *Id.* at 177.

¹⁸ "Resolved, as the opinion of this committee, that nothing in the Constitution, now under consideration, shall be construed to authorize the Congress to make or alter any regulations, in any state, respecting the times, places, or manner of holding elections for senators or representatives, unless the legislature of such state shall neglect or refuse to make laws or regulations for the purpose, or, from any circumstance, be incapable of making the same, and then only until the legislature of such state shall make provisions in the premises."

2 *Elliot's Debates* 325-26.

vent the dissolution of the Union."¹⁹ In the discussion that followed, the delegates said that Article I, Section 4 provided state and federal legislatures with the power to determine who could vote, where they could vote, and how to establish voting districts.²⁰ Jay's views, as well as those of his critics, show that both Federalists and Anti-Federalists thought the power given by Article I, Section 4 was broad. Indeed, Jay argued for adopting the Constitution while acknowledging the amplitude of Article I, Section 4. This view was similarly held in the great southern state of Virginia.

Two of the central figures in early American history debated Article I, Section 4 before the Virginia convention. James Madison spoke in favor of the Constitution before the Virginia convention. Patrick Henry opposed him. Their views about Article I, Section 4 recapitulate and highlight those views presented in the northern conventions. Patrick Henry said,

[B]ut how will they obviate the danger of referring the manner of election to Congress? Those illumined genii may see that this may not endanger the rights of the people; but in my unenlightened understanding, it appears plain and clear that it will impair the popular weight in the government. Look at the Roman history. They had two ways of voting – the one by tribes, and the other by centuries. By the former, numbers

¹⁹ *Id.* at 326. Since the existence of the United States is not threatened by the Arkansas amendment, the use of such power by the courts would "apply that theory of interpretation [to the Constitution] which was then rejected by the friends of the new constitution, and . . . engraft upon it powers . . . extent, which were disclaimed by . . . [advocates of the Constitution], and which, if they had been fairly avowed at the time, would have prevented . . . [the Constitution's] adoption." Argument of Mr. Martin, Attorney General of Maryland in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 373 (1819).

²⁰ 2 *Elliot's Debates* 326-29.

prevailed; in the latter, riches preponderated. According to the mode prescribed, Congress may tell you that they have a right to make the vote of one gentleman go as far as the votes of a hundred poor men. The power over the manner admits of the most dangerous latitude.²¹

Here, Patrick Henry illuminates the key problem with Article I, Section 4: the word "manner" is open to an interpretation so broad that it would allow the states or Congress to change the value of the citizens' votes.²²

James Madison responded to Patrick Henry's comments by reiterating what he had said at the Constitutional Convention: ultimate power over elections had to be given to Congress to "prevent its own dissolution."²³ Similar arguments were made at other conventions. For instance, Representative James Iredell, later a justice of the United States Supreme Court, stated in the North Carolina convention that the federal legislature needed this power in case a state was involved in war and its legislature could not assemble to send representatives,²⁴ or a few states might deprive their electors of the right to vote,²⁵ or a few states might combine to prevent an election of representatives at all, thus preventing formation of a quorum in Congress.²⁶ Madison attempted to assuage the fears of the

²¹ 3 *Elliot's Debates* 175.

²² See also Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 103-04 (1991).

²³ 2 *Elliot's Debates* 366.

²⁴ 4 *Elliot's Debates* 53.

²⁵ *Id.* at 54.

²⁶ *Id.*

Anti-Federalists by further noting that "in most instances though, if [elections] be regulated properly by the state legislatures, the congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution."²⁷ Madison thus re-emphasized that even though the term "manner" is broad, Congress was not likely to use the power given to it by such language to abuse the states. Madison, just like the proponents of the Constitution in the other debates, never disputed that manner has a meaning so broad that it could allow Congress to make the votes of one person equal to those of a hundred, or to entirely prevent elections. Instead, he merely argued that as long as a state did not abuse its power so as to threaten the Union, Congress would be unlikely to act.

This debate between Patrick Henry and James Madison captures the sense of the various state debates and the meaning of Article I, Section 4 as seen by the members of the various conventions. "Manner" was seen as an expansive term. Indeed, those opposing its inclusion in the Constitution thought that it allowed those with authority – ultimately Congress – unlimited discretion to control elections. Similarly, those championing ratification stated that although the term "manner" provides expansive powers, Congress is likely to exercise its power under this clause only when it must do so to preserve itself as an institution. Thus, the arguments of both Federalists and Anti-Federalists support Arkansas's Amendment 73. Furthermore, these discussions indicate that Congress has the power to modify or reform the Arkansas amendment if it thinks that the amendment strikes at the heart of representative government.

Finally, despite Madison's strong championing of the Constitution as then proposed, Virginia's convention also sought to limit congressional power with an amendment

3 *Elliot's Debates* 367. See also comments by Nicholas, *Id.* at 10.

similar to those proposed in the northern states.²⁸ This amendment, along with similar ones proposed by other conventions, shows that the states feared the power of Article I, Section 4 and wanted to constrain the federal legislature's ability to abuse it. Thus, the discussions at the state conventions, as well as amendments proposed at them, reveal that the powers retained by the states under Article I, Section 4 are far more extensive than those exercised by the citizens of Arkansas in adopting Amendment 73.²⁹

C. The Federalist and Anti-Federalist Papers

The Federalist and Anti-Federalist dispute was not confined to the state conventions. Newspaper accounts and pamphlets were written by those who advocated adoption of the proposed Constitution – the Federalists – and by those who opposed adoption – the Anti-Federalists. The views of both Federalists and Anti-Federalists support the constitutionality of Amendment 73 of the Arkansas Constitution.

The New York newspapers carried one of the great debates regarding adoption of the Constitution. The articles, written under the pseudonym Publius, urged New York to ratify the Constitution and were used as models for debates elsewhere.³⁰ One of the chief writers of these articles was Alexander Hamilton. His careful evaluation reinforces the broad interpretation of Article I, Section 4

²⁸ "That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same." 3 *Elliot's Debates* 661. Pennsylvania proposed a similar amendment. 2 *Elliot's Debates* 441.

²⁹ Other states have no information to add to the discussion because they have left few recorded debates.

³⁰ *The Federalist* at ix-xi (Clinton Rossiter ed., 1964).

previously discussed and supports the constitutionality of Amendment 73. He stated in Federalist No. 59: "I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation."³¹ He further noted that the proposed Constitution would establish a system in which, in the ordinary course of events, the states would regulate elections.³² Hamilton argued that Congress was given the ultimate power over providing for the election of senators and representatives in order to prevent the dissolution of the federal government by the states.³³ If the federal government was not given this power, some members of some states, through their ability to regulate elections, could "discontinue the choice of members for the Federal House of Representatives."³⁴ Hamilton's analysis of Article I, Section 4 concurs with that of every other contemporaneous source in positing that states have extremely broad power over elections. Their power is virtually unlimited except insofar as Congress can correct their actions or insofar as their actions conflict with another constitutional provision. Hamilton further noted that the Constitution submits "the regulation of elections

³¹ *Id.* at 362.

³² *Id.* at 362-63.

³³ *Id.* at 364-65.

³⁴ *Id.* at 366.

for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory."³⁵ Hamilton thus argued that states have the primary power to regulate their elections and that only an impropriety that threatens Congress's essential functions can be corrected by Congress. Under Hamilton's reading of the Constitution, the courts should not arbitrate disputes over the regulation of elections.³⁶ In his view, such disputes ought to be fought out between the states and Congress. If Congress believes that a state has overreached itself, Congress clearly has the power to correct that action.

The reason for giving Congress this power arose in the context of a weak central government and strong state power. Providing Congress with the ultimate power to control elections was done, according to Hamilton, because "to do otherwise would leave the existence of the Union entirely at [the states'] mercy."³⁷ The states might annihilate the federal government by various measures without this safeguard.³⁸

Hamilton recognized that the states' power under the Constitution was such that if the state legislatures acted in unison pursuant to Article I, Section 4 they could reduce the Senate's power by not choosing senators. He did not say that state legislatures lack such power, but that the use of such power could be mitigated by Congress pursuant to its power under Article I, Section 4. Hamilton also noted that the Constitution dealt with such potential problems by staggering elections, thereby giving any such state actions minimal effect by leaving the Senate with a

³⁵ *Id.* at 362-63.

³⁶ Unless, of course, some other part of the Constitution is violated.

³⁷ *Id.* at 363.

³⁸ *Id.*

quorum after each election.³⁹

In addition, the direct election of representatives was seen as a counterbalance to any attempt by a few persons in a state legislature to control the election of federal representatives.⁴⁰ This counterbalance again shows the dedication of the Founders to a balance of powers within the federal government and between the states and the federal government. Because of their concern over state manipulation of federal representatives, the representatives to the Constitutional Convention granted Congress the power to correct any regulations it deemed wrongly enacted or even unconstitutional. In so doing, it saw that Congress's self-interest was sufficient to correct state abuses and that the courts need not step in to resolve most disputes.

The Anti-Federalist attacks on Article I, Section 4 predictably paralleled the arguments made against it in the various state conventions. Just as predictable was the fact that the Anti-Federalists agreed that the powers granted under Article I, Section 4 gave the legislature broad authority. The words of pseudonymous Agrippa were typical:

Can any man, in the free exercise of his reason, suppose that he is perfectly represented in the legislature, when the legislature may at pleasure alter the time, manner and place of elections. By altering the time they may continue a representative during his whole life; by altering the manner they may fill up the vacancies by their votes without the consent of the people; and by altering the place all the elections may be made at the seat of the federal government.⁴¹

³⁹ *Id.* at 363-65.

⁴⁰ *Id.* at 365-66.

⁴¹ Letter from Agrippa to the Massachusetts Convention (Jan. 22, 1788), in 4 *The Complete Antifederalist*, 102 (1981). See also Centinel's

The people feared that "manner" was an expansive term that allowed the legislature broad power to change elections. They particularly feared that this power could be exercised by Congress to appoint whomever they wished to congressional offices.

Thus, every historical source of information confirms that both the states and Congress were thought to have powers under Article I, Section 4 that far exceed those exercised by Arkansas under Amendment 73.⁴²

letter to the Freemen of Pennsylvania at 142; *Aristocratis of Pa.*, v. 3 at 201; *Vox Populi* v. 4 at 42; *Cincinnatus* v. 6 at 31.

⁴² Joseph Story also thought that these powers were extensive. He wrote:

The most that can be urged, with any show of argument, is, that the power might, in a given case, be employed in such a manner as to promote the election of some favorite candidate or favorite class of men.

Joseph Story, *Commentaries on the Constitution*, §820 at 578 (4th ed. 1973).

II. AGE, CITIZENSHIP AND INHABITANCY ARE ONLY MINIMAL REQUIREMENTS

Article I, Section 2 of the United States Constitution, as well as Section 3, set forth minimum requirements for the respective offices. Section 2 states:

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Although Arkansas Amendment 73 does not prohibit someone from serving in Congress if elected, the Arkansas Supreme Court has treated Amendment 73 as a disqualification. Furthermore, it has held that age, citizenship, and inhabitancy are exclusive qualifications. Contrary to the view of the Arkansas Supreme Court, all the historical evidence reveals that the federal and state conventions, as well as the states and Congress, have uninterruptedly thought that age, citizenship, and inhabitancy were minimum requirements. In fact, the First Congress, in which James Madison served, enacted two statutes disqualifying some persons from holding an office under the United States.⁴³ Such disqualifications have been enacted at least thirty-eight other times in eleven separate Congresses.⁴⁴

⁴³ Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (treasury officials acting with conflicts of interest); Act of Apr. 30, 1790, ch. 4, 1 Stat. 112 (persons who bribe a federal judge or being bribed as a federal judge). Of the 39 signers of the Constitution, 17 served in the First Congress. Besides Madison, Rufus King and Robert Morris also served in the First Congress. See generally *Guide to the Congress of the United States*, 1a-175a (Congressional Quarterly Service, 1971); 4 *The Records of the Federal Convention*, 587-90 (Max Farrand, ed., 1937).

⁴⁴ Act of Apr. 10, 1806, ch. 20, 2 Stat. 359, 362 (army officer who makes, signs, or directs a false muster); Act of Apr. 10, 1806, ch. 20,

Moreover, at least eleven such disqualifications are part of the current *United States Code*.⁴⁵ This unbroken history and current practice are also supported by the pre-enactment history.

2 Stat. 359, 362 (army officer who accepts money on mustering any regiment or troops); Act of Feb. 26, 1853, 10 Stat. 170, 171 (fraud on treasury of the United States); Act of Feb. 26, 1853, ch. 81, 10 Stat. 170, 171 (bribery or undue influencing of members of Congress); Act of July 16, 1862, ch. 180, 12 Stat. 577, 578 (members of Congress or officer of United States who takes consideration for procuring contracts or those who offer money to such persons); Act of June 11, 1864, ch. 119, 13 Stat. 123 (members of Congress or heads of departments who receive pay for services in any matter where the United States is a party); Act of Feb. 25, 1865, ch. 52, 13 Stat. 437 (interference with elections by military); Act of Mar. 2, 1867, ch. 153, 14 Stat. 428, 429 (disqualified persons of rebel states); Voting Rights Act of 1870, ch. 114, 16 Stat. 140, 141 (conspiring to deprive someone of civil rights); Act of Mar. 22, 1882, ch. 47, 22 Stat. 30, 31-32 (bigamists and polygamists prevented from holding office); Criminal Code of 1909, ch. 321, 35 Stat. 1088-1112 (twelve different disqualifications including treason, rebellion, civil rights violations, bribe taking and bribe giving); Criminal Code of 1948, ch. 645, 62 Stat. 683, 691-97 (acceptance or solicitation of bribes and procurement of contracts); Criminal Code of 1948, ch. 645, 62 Stat. 683, 719-20 (troops at the polls); Criminal Code of 1948, ch. 645, 62 Stat. 683, 790 (trading in public property); Criminal Code of 1948, ch. 645, 62 Stat. 683, 795 (concealment, removal or mutilation of records); Criminal Code of 1948, ch. 645, 62 Stat. 683, 807-08 (treason, rebellion, or insurrection); Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 991-92 (communication of classified information).

⁴⁵ 18 U.S.C. § 203(b) (1994) (compensation to members of Congress, officers and others for matters affecting government); 18 U.S.C. § 592 (1994) (sending troops to the polls); 18 U.S.C. § 592 (1994) (interference by armed forces in elections); 18 U.S.C. § 1901 (1994) (trading in public property); 18 U.S.C. § 2071(b) (1994) (concealment or mutilation of documents); 18 U.S.C. § 2381 (1994) (treason); 18 U.S.C. § 2383 (1994) (rebellion or insurrection); 18 U.S.C. § 2385 (1994) (advocating overthrow of government); 18 U.S.C. § 2387 (1994) (advocating mutiny or insubordination in military); 46 U.S.C. § 59 (1994) (neglect of proper registering and recording of vessels by officers); 46 U.S.C. § 322 (1994) (malfeasance pertaining to regulation of vessels).

A. The Constitutional Convention

The discussion of age, citizenship, and inhabitancy at the Constitutional Convention, the wording of Article I, Sections 2 and 3, and the structure of the Constitution all suggest that the requirements of age, citizenship, and inhabitancy for senators and representatives were meant to ensure that states sent minimally qualified candidates to the federal Congress. Madison's notes taken at the Constitutional Convention do not provide any support for the proposition that age, citizenship, and inhabitancy are the exclusive qualifications for members of Congress imposed by the Constitution.⁴⁶

Property and money qualifications were vigorously debated when various plans were discussed at the Constitutional Convention. Such qualifications were rejected by the Convention because property or money qualifications might keep persons of ability out of government.⁴⁷ The Convention finally agreed that the list of disqualifications should be shorter rather than longer, thereby "leaving to the wisdom of the Legislature and the virtues of the Citizens, the task of providing against evils [of bad legislators]."⁴⁸ The wisdom of the legislature or citizens might lead them to prevent other categories of persons from holding office. This agreement to establish minimal qualifications is understandable because the Constitutional Convention was called to limit state power. The Convention was trying to protect the federal government by developing requirements that all federal officers must have to serve in federal office. The Convention did not prevent the states from setting higher standards.

⁴⁶ James Madison, *Notes of Debates in the Federal Convention* (2d ed. 1985).

⁴⁷ *Id.* at 373. Gouverneur Morris noted that some proposed indebtedness qualifications might have enabled an over-zealous auditor to keep General Washington from being President.

⁴⁸ *Id.* at 377-78 (Comments of Elsworth).

As a consequence, only an age qualification for federal representatives was agreed to by the Convention until the Committee of Detail proposed on August 6, 1787, that residency and citizenship be added.⁴⁹ These additional requirements were the subject of considerable debate.⁵⁰ None of these discussions, however, indicated that the requirements established by the Constitution prohibit the states from imposing additional qualifications. The very reason for the requirements was to protect the federal legislature from foreign or immature counsel. This protection is not weakened by states adding requirements. To assume that the stated requirements were exclusive is to misunderstand the reasons for establishing them. The federal government wanted to prevent states from sending people too little qualified for federal office, not to prevent states from adding to these requirements as each state saw fit. Although adding requirements to representatives destroys uniformity, citizenship and inhabitancy were defined by state law at the time of the Constitutional Convention.⁵¹ Therefore, these requirements were never uniform, but dependent upon the law in each of the states.

Moreover, what is absent from the Constitution, as well as its express terms, provides valuable insight into the meaning of Article I, Sections 2 and 3. One of the most interesting sections proposed by the Committee of Detail on August 6 was entirely rejected. In Article VI, Section 2, the Committee had set forth the power of the federal legislature "to establish such uniform qualifications of the members of each House, with regard to property, as to the

⁴⁹ *Id.* at 386.

⁵⁰ Some worried that foreign nations might seek to place their agents in Congress. *Id.* at 406. Others thought that too long or too short a time would penalize persons in some of the newer states. *Id.* at 407. Inhabitancy replaced residency because it was thought to be less ambiguous. *Id.* at 406-408. See also *id.* at 418-23.

⁵¹ Hills, *supra* n. 22, at 117-19.

said Legislature shall seem expedient."⁵²

It appears that Section 5 was written in light of Section 2 allowing "[e]ach House [to be] the judge of the elections, returns and qualifications of its own members."⁵³ The term "qualifications" was placed in Section 5 because each House would have to judge whether or not a member met the proposed property qualifications. Judging "qualifications" then only appeared to involve property and not the age, citizenship, and inhabitancy requirements of Article I, Sections 2 and 3.

Article VI, Section 2 was rejected in its entirety partly because of fear that one group would use its power to set property qualifications to exclude others.⁵⁴ In addition, it was thought that the section as written "would constructively exclude every other power from regulating qualifications."⁵⁵ The Convention then adopted Section 5 without comment and thereby left ambiguous what qualifications the Houses are to judge.

The discussion set forth above leads to several conclusions. First, the requirements of age, citizenship, and inhabitancy do not prevent the states from raising their own standards. Instead, these requirements were meant as minimum qualifications to protect the national legislature. In addition, the rejection of property qualifications while retaining Article I, Section 5, which allows each House to judge the qualifications of its members, was meant to allow the federal legislature to protect itself from domination by foreign or destructive forces.⁵⁶ It was

⁵² See Madison, *supra* n. 46 at 382.

⁵³ *Id.*

⁵⁴ *Id.* at 425-28.

⁵⁵ *Id.* at 428. (Comments of Wilson).

⁵⁶ *Id.* at 437-42.

not meant to prevent the states and their citizenry from adopting higher standards.

This perspective on the meaning of these sections is strengthened by the text of the Constitution as finally adopted by the Constitutional Convention. When the Committee on Style and Arrangement reported the Constitution to the delegates on September 12, 1787, the language of Article I, Sections 2 and 3 was written so as to suggest that the requirements set forth established a minimum base. Article I, Section 2 states, "No person shall be a Representative who shall not have attained to . . . and been . . . and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."⁵⁷ Article I, Section 3 uses the same qualifiers. Thus, the language, "shall not have attained to" indicates that anyone not meeting these criteria is rendered incapable of serving in the respective House. If these requirements were meant to be exclusive, one would expect language explicitly excluding state power to add qualifications. See Article I, Section 10. This failure speaks all the more clearly because the Committee reworked the previous proposal of August 6th, which stated that members of the House "shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election, and shall be, at the time of his election, a resident of the State in which he shall be chosen."⁵⁸ The "at least" wording indicates that the qualifications were minimal criteria. When one reads the penultimate version in light of the final wording of the Constitution and the meetings of the Constitutional Congress, one realizes that no basis exists for suggesting that the states could not place higher requirements on their representatives. This earlier version, the later ver-

⁵⁷ *Id.* at 616-17.

⁵⁸ *Id.* at 386.

sion, and the lack of comment on the change suggests that the requirements were minimum criteria.⁵⁹

None of the discussions at the Constitutional Convention reveal either that age, citizenship, and inhabitancy are exclusive qualifications or that states could not add requirements. Such a lack of evidence, at a Convention that was called in large measure to limit state power, is as determinative as history can be. If the delegates to the Constitutional Convention wanted to limit state power regarding qualifications, they would have done so. See, e.g., Prohibitions on states in Article I, Section 10. Therefore, even if Amendment 73 adds requirements rather than merely limits access to the ballot, it would be constitutional.

B. The State Ratifying Conventions

The debate over Article I, Sections 2 and 3 in the state ratifying debates stands in stark contrast to the breadth and ferocity of the argument over Article I, Section 4. A review of the recorded debates indicates that no discussion of Article I, Sections 2 and 3 occurred. Given the recorded discussion over Article I, Section 4, one would expect that state representatives would have objected to Article I, Sections 2 and 3 if they thought that it limited their power to establish additional qualifications. The absence of such debate indicates that the clause should not be so interpreted.

C. The Federalist Papers and Anti-Federalist Papers

No evidence exists in the public debates between the Federalists and Anti-Federalists supporting the view that states could not add requirements to those of age, citizenship, and inhabitancy. In fact, the debates parallel those at the Constitutional Convention that indicated that the requirements act as a floor, but are not exclusive.

⁵⁹ See Hills, *supra* n. 22, at 110-12.

In Federalist No. 52, James Madison began his defense of the requirements established for members of Congress. Madison justified these minimal requirements by arguing that the states retained the power to send persons of merit to Congress. He noted that the requirements for the House of Representatives were reasonable limitations by which "the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."⁶⁰ Madison uses the metaphor of the open "door" to convince the states that the Constitution will not severely limit the states' power to send whomever they wish to Congress. As long as the elected representatives fit through the open door, Congress will not refuse to seat them.

Madison argued that these requirements "being less carefully and properly defined by the state constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention."⁶¹ This brief has already shown that these requirements were not uniform in fact.⁶² Nevertheless, Article I, Sections 2 and 3 do give the appearance of uniform requirements.

Madison's arguments in support of Article I, Sections 2 and 3 show that he was trying to convince the states to accept minimal requirements for legislators. Since the door would still be open, the states' power to send whomever it wished to Congress would not be significantly circumscribed by the Constitution. Few, if any, persons of merit would be excluded by the requirements of Article I, Sections 2 and 3.

⁶⁰ *The Federalist* No. 52.

⁶¹ *Id.*

⁶² See *supra* n. 51 and accompanying text.

This reading of Madison's position is strengthened by Article I, Section 5 which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." This article allows Congress to decide whether or not someone can come through the door. It does not give Congress or the courts the power to prevent the states from attempting to send whomever they wish to serve them. In addition, Congress, not the courts, is given the power to judge whether or not a person has met the requirements established by the Constitution. This sense of how these two clauses work was reiterated by Madison in Federalist No. 53 when he stated that, "Each house is, as it necessarily must be, the judge of the elections, qualifications, and returns of its members."⁶³ If anyone is deemed to lack the requisite qualifications, the respective House can choose not to seat them. The actions of states in choosing whom to send to Congress is thus regulated by the respective House. Therefore, the courts need to act only if another part of the Constitution is implicated. No such implication arises from the enactment of Amendment 73 by the people of the State of Arkansas.

CONCLUSION

The judgment below should be reversed and the case remanded for an entry of judgment in favor of petitioners.

Respectfully Submitted,

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⁶³ *The Federalist* No. 53.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Governor John Engler as Amicus Curiae supporting the petitioners has been served on all parties required to be served by first class mail, postage prepaid, addressed as follows:

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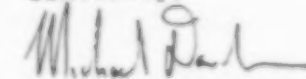
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Re: *U.S. Term Limits, Inc., et al. v. Thornton*,
No. 93-1456; *Bryant v. Hill*, No. 93-1820.

Dear Mr. Safranek:

On behalf of respondent Senator Dale Bumpers, we consent to your filing a brief as amicus curiae in this case.

Sincerely,



Michael Davidson

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Re: U.S. Term Limits, Inc. v. Thornton
Bryant v. Hill
 Nos. 93-1456 and 93-1828
Supreme Court of the United States

Dear Professor Safranek:

Petitioners in No. 93-1456 consent to the
 filing of a brief amicus curiae on behalf of Citizens
 United Foundation.

Sincerely,

John G. Kester



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August 10, 1994

Mr. William K. Suter, Clerk
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Re: U. S. Term Limits, Inc., et al. v. Thornton,
Bryant v. Hill; Nos. 93-1456 and 93-1828

Dear Mr. Suter:

On behalf of Petitioners, the State of Arkansas, ex
 rel., please be advised that we consent to the filing of any
 amicus curiae briefs in support of Petitioners', State of
 Arkansas, ex rel. and/or U. S. Term Limits, Inc., et al., as
 well as any amicus curiae briefs in support of any of the
 Respondents.

Sincerely,

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Re: U.S. Term Limits, Inc. et al. v. Thornton and Bryant v.
Hill; Nos. 93-1456 and 93-1828

Dear Mr. Suter:

On behalf of Senator David Pryor, please be advised that we consent to the filing of any amicus curiae briefs in support of Petitioners U.S. Term Limits, Inc., et al. and/or the State of Arkansas.

Sincerely,

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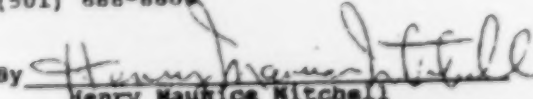
Re: U.S. Term Limits, Inc., et al. v. Thornton, Bryant
v. Hill; Nos. 93-1456 and 93-1828

Dear Mr. Suter:

On behalf of Respondents The Democratic Party of Arkansas, Representative Ray Thornton and Representative Blanche Lambert, please be advised that we consent to the filing of any amicus curiae briefs in support of Petitioners U.S. Term Limits, Inc., et al. and/or the State of Arkansas.

Respectfully submitted,

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VIA TELECOPY

Mr. William K. Suter, Clerk
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 One First Street, N.E.
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Re: U.S. Term Limits, Inc., et al.
 v. Thornton, Bryant v. Hill
 Nos. 93-1456 and 93-1828

Dear Mr. Suter:

On behalf of Respondents Bobbie Hill, on behalf of The League of Women Voters of Arkansas and Dick Herget please be advised that we consent to the filing of any amicus curiae briefs in support of Petitioners U.S. Term Limits, Inc., et al. and/or the State of Arkansas.

Yours truly,

Elizabeth J. Robben
 Elizabeth J. Robben

EJR/pc

cc Mr. John Kester (via telecopy)
 Mr. Winston Bryant (via telecopy)
 Ms. Sherry Bartley (via telecopy)
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JOHN T. HARMON

August 9, 1994

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Re: U.S. Term Limits, Inc., et al. v. Thornton, Bryant v. Hill
 Nos. 93-1456 and 93-1828

Dear Mr. Suter:

On behalf of Respondents Steve Goss and Americans for Term Limits, please be advised that we consent to the filing of any amicus curiae briefs in support of Petitioners U.S. Term Limits, Inc., et al. and/or the State of Arkansas as well as any amicus curiae briefs in support of any Respondents.

Sincerely,

John T. Harmon
 John T. Harmon

JTH:la

cc: Mr. John Kester
 Mr. Winston Bryant
 Ms. Sherry Bartley
 Mr. James V. Lacy
 Ms. Deborah La Petra
 Mr. Morgan J. Frankel
 Mr. Timothy W. Grooms
 Ms. Elizabeth J. Robben
 Ms. Margaret H. Spurlin
 Mr. James E. Bond
 Mr. Jeffrey C. Dannenberg
 Mr. Stephen J. Safranek
 Mr. William J. Olson
 Mr. Anthony T. Casco

Ms. Jan O'Brien
 Mr. Lowell D. Weeks